



American Cotton Shippers Association
88 Union Avenue, Suite 1204
Memphis, T N 38103

P (901)525-2272
F (901)527-8303
www.acsa-cotton.org

BEFORE THE
FEDERAL MARITIME COMMISSION

**Comments on the Proposed Rule Establishing the Definition of Unreasonable Refusal to Deal or
Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier**

Docket No. 22-24

NON-CONFIDENTIAL

October 21, 2022

I. Introductory Comments on the FMC's Invitation for Comments

The American Cotton Shippers Association (“ACSA”) is pleased to submit the following comments to the Federal Maritime Commission (“Commission”) in response to its request for public comments concerning the definition of unreasonable refusal to deal or negotiate with respect to vessel space accommodations provided by an ocean common carrier, published in the Federal Register at 87 Fed. Reg. 57674 (September 1, 2022), in the context of the Commission’s Notice of Proposed Rulemaking (NPRM) in accordance with the Ocean Shipping Reform Act of 2022 (OSRA).

OSRA prohibits ocean common carriers from unreasonably refusing to negotiate or deal with respect to vessel space accommodations. The law also requires the Commission to promulgate rules to define the

elements necessary to establish a violation and the criteria it will consider in assessing reasonableness.

ACSA applauds both Congress for enactment of OSRA and the Commission for its hard work to ensure a timely rulemaking and effective implementation of this important statute.

As the following comments will explain in greater detail, ACSA strongly supports the proposed rule and offers its agreement with the Commission's rationale on which it is based. Further, ACSA urges the Commission to find a rebuttable presumption of an unreasonable refusal to deal or negotiate where an ocean common carrier persistently excludes certain classes or types of cargo, such as a specific kind of agricultural commodity, even if the carrier might have considered other classes or types of cargo for carriage.

II. Background on ACSA

ACSA is a leading trade association, headquartered in Memphis, Tennessee, that provides a united voice for the cotton merchandising trade of the United States. ACSA's member firms handle over 70% of the U.S. cotton sold in domestic and foreign markets and over 60% of the traded foreign cotton growths in the world. ACSA takes an active role in promoting the increased use of cotton in the U.S. and throughout the world, establishing with other cotton trade organizations national and international standards for trade, collaborating with producer organizations throughout the cotton belt in formulating farm programs, and cooperating with government agencies in the administration of such programs.

ACSA members purchase cotton from producers and sell to consumers all over the world. In addition to helping their customers manage risks from price, location, quality, capacity, cash flow, and currency value, ACSA members bear the responsibilities of managing supply chain logistics to fulfill their contractual obligations of timely and proper delivery to its destination, throughout the globe. Since more than three-fourths of the U.S. raw cotton crop is exported, the maintenance of intermodal supply chain velocity and integrity is an absolute necessity for our industry.

ACSA members may collectively ship greater than 150,000 forty-foot containerized loads of cotton in a given year, dependent upon U.S. crop size. Further, ACSA members have had a valuable and lasting relationship with ocean carriers shipping U.S. cotton that has endured more than three decades.

On behalf of the U.S. cotton shipping industry, and as an important stakeholder in the safe and efficient movement of U.S. cotton to export markets, ACSA appreciates the opportunity to offer these public comments.

III. U.S. Cotton Shippers Depend on Timely and Cost-Effective Access to Ocean Shipping

Cotton is a uniquely non-fungible agricultural commodity that is heavily dependent on timely and cost-effective access to export markets. According to the most recent estimates of the U.S. Department of Agriculture, more than 75% of U.S. raw cotton is exported for further processing, making it consistently the largest exporter in the world.¹ Another 15-20% of U.S. cotton is exported in the form of semi-processed textile goods for further processing. Thus, the economic well-being of the U.S. cotton industry, including U.S. shippers, relies on the smooth, efficient operation of the entire U.S. intermodal transportation system.

Raw cotton is grown primarily in the country's interior. After harvest, it is ginned and formed into bales of generally uniform size, mass, and shape, after which it is then reconcentrated to intermodal hubs for transportation by truck or rail to either domestic textile mills or U.S. ports of export. It is almost entirely containerized in shipment.

Given that so much of the U.S. crop is destined for export markets, cotton also comprises one of the largest sources of containerized agricultural exports in the country, having the potential to sail greater than 200,000 forty-foot containers annually. This means that dependable service from ocean common carriers,

¹ See U.S. Department of Agriculture, *Cotton: World Markets and Trade*, October 2022, [cotton.pdf \(usda.gov\)](https://www.usda.gov/media/press-releases/2022/10/18/cotton-world-markets-and-trade) (last accessed on October 18, 2022).

with commercial and legal certainty, is necessary to protect both our industry, the rural economies where cotton is grown, and the competitiveness of broader U.S. agriculture sector.

Over the past three decades, as consumption of the U.S. cotton crop shifted from domestic mills to, now, primarily foreign mills, U.S. cotton shippers developed a mutually beneficial and cooperative relationship with ocean common carriers. U.S. cotton became an ideal cargo for backhaul to complement the delivery of imported manufactured goods.

Unfortunately, over the past three years, ocean common carriers have increasingly ignored U.S. cotton shippers as suppliers for backhaul cargo. This has caused severe disruptions to the U.S. cotton supply chain and imposed severe costs on U.S. shippers.

IV. Promoting the Growth of U.S. Exports by Preserving Service Offerings to Exporters is a Main Purpose of OSRA

In its proposed rule, the Commission aptly notes that Congress amended the “Purposes” section of the Commission’s authority under the Shipping Act in 46 U.S.C. 40101 to:

(4) promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.

Perhaps in few industries is the purpose more important than in the U.S. agricultural sector. The promotion and competitiveness of U.S. exports has been a core element of U.S. agricultural policy since the Great Depression. During that same period, the promotion of U.S. exports and the elimination of barriers that distort foreign market access for U.S. goods, have also been explicitly a core element of U.S. trade policy, dating back at least to the Reciprocal Trade Agreements Act of 1934, codified regularly by Congress as a principal trade negotiating objective of Trade Promotion Authority (formerly known as “fast track”).

Reflecting this essential element of U.S. economic policy, Congress added to OSRA, in Section 41110, a requirement that ocean common carriers provide to the Commission data showing the total number

of import and export tons and units that are handled per vessel, which the Commission must publish quarterly.

Thus, successful implementation of OSRA, and enforcement of its prohibition against unreasonable refusal to deal or negotiate with respect to vessel space accommodations, must take into account the need for sufficient balance in service provision to U.S. exporters of all types of goods, especially U.S. agricultural products.

V. ACSA Strongly Supports a Rebuttable Presumption of Unreasonable Refusal to Deal in Instances of Categorical Exclusion

ACSA strongly supports the Commission's stance that a categorical exclusion by an ocean common carrier of U.S. exports for backhaul would create a rebuttable presumption of an unreasonable refusal to deal.

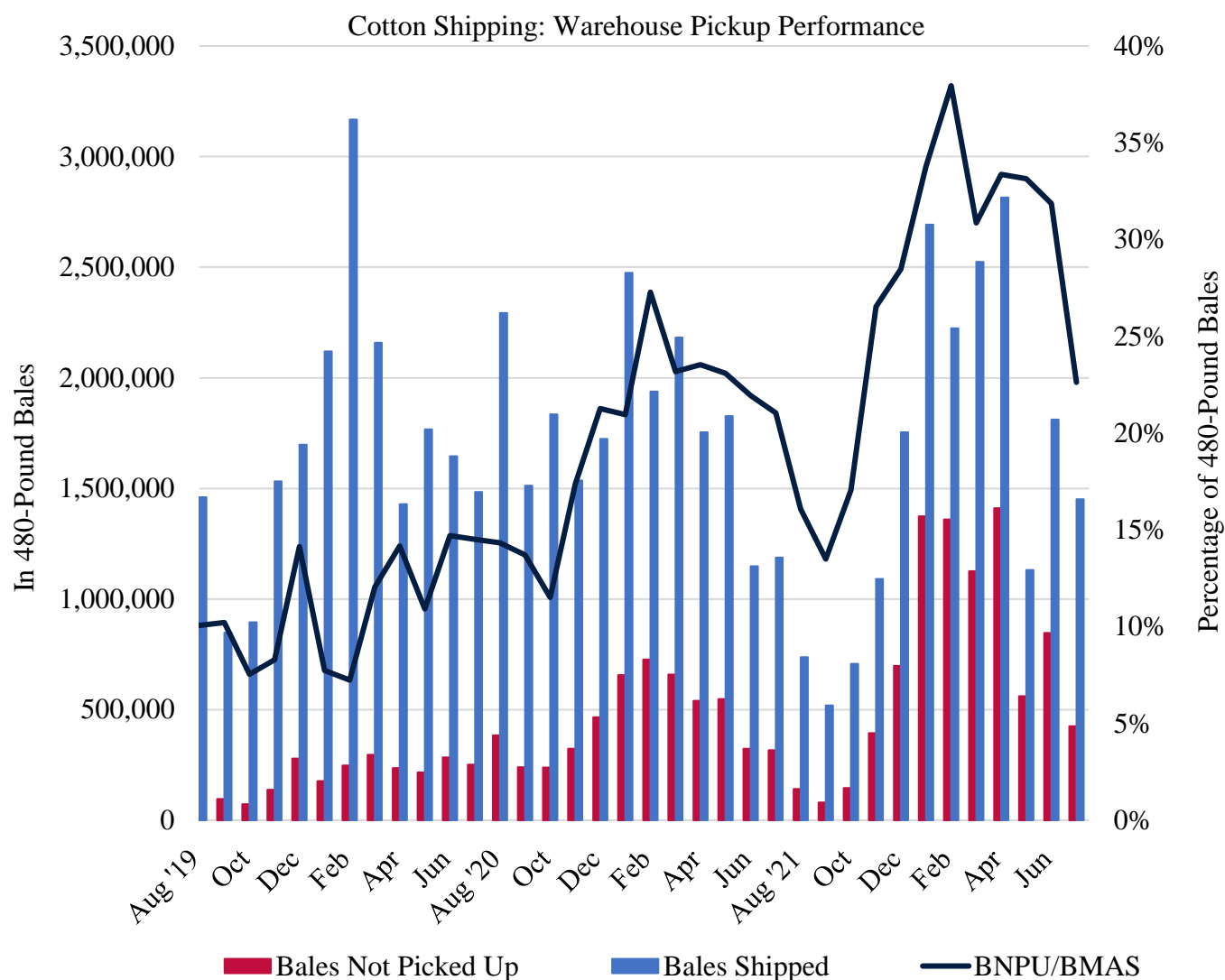
Moreover, while such a categorical exclusion would clearly evidence unreasonable behavior, ACSA urges the Commission to find a rebuttable presumption of unreasonableness in a broader range of instances, such as those in which a carrier persistently excludes certain classes or types of cargo that are destined for export, even if the carrier might consider other classes or types of cargo for carriage. Such an excluded class or type of cargo could be a single kind of agricultural commodity or it could encompass all agricultural commodities. The exclusion of a certain class or type of cargo would impose the same harm on the excluded shippers, and on the producers and their export of the subject product, as a categorical exclusion of all classes or types of cargo, even if the harm were concentrated on only the affected industries.

VI. Containerized Exports of U.S. Cotton Are Increasingly Excluded from Reasonable Service

Since 2019, the U.S. cotton industry has experienced a growing exclusion by ocean common carriers of U.S. cotton shipments destined for export. U.S. consumers vastly increased their purchase of tangible, manufactured goods rather than experiential items due to the constraints imposed on travel and other social interactions during the COVID-19 pandemic. ACSA believes that the demand for and value of efficiently

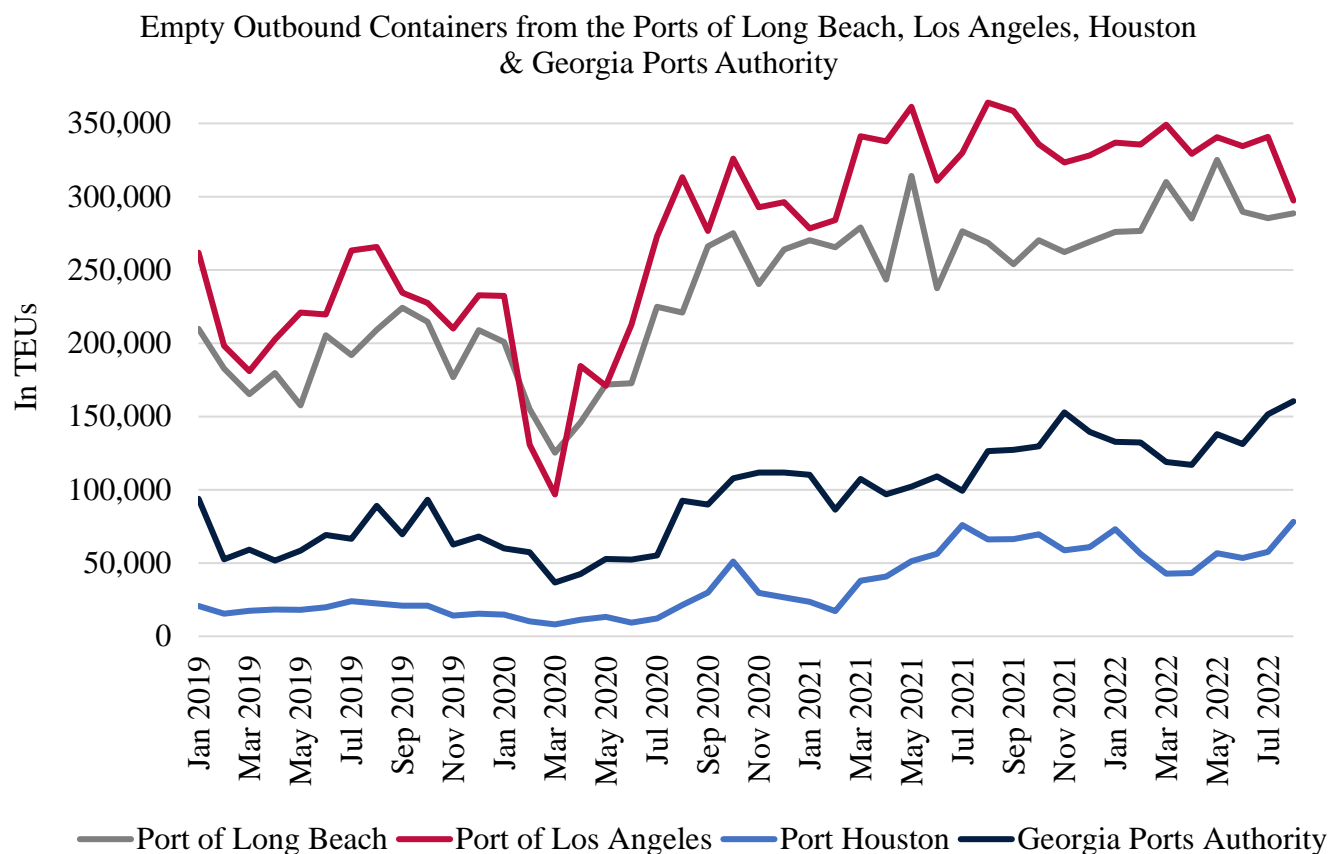
utilizing containers to sail these manufactured imports to the United States triggered a categorical denial of service to cotton as an export backhaul. Simply put, it became more lucrative not to load and unload cotton or other containerized exports, rather to utilize that time to maximize the number of import sailings. This shift in service focus to imports contributed to the significant increase in inbound cargo that inundated all components of our supply chain. Balanced and reasonable service to both importers and exporters yields a more functional supply chain in the United States.

The bar chart below shows, on a monthly basis from August 2019 through July 2022, the bales of cotton that were actually shipped (indicated in blue) and the bales that were not picked up (indicated in red). The black bar line measures the ratio of bales made available for shipment (“BMAS”) by the warehouse against bales that were not picked up for shipment despite their availability. BMAS indicates that bales were under order for shipment at an appointed time. The failure to pick up these bales results in late pick-up fees, additional storage costs and other carrying costs, displaying poor performance during evident demand to ship U.S. cotton.



As the black bar line indicates, the volume of bales not picked up as a percentage of BMAS more than doubled over the three-year period, even when a significant drop in the final three months of this period is factored in. More particularly, in the 2021-2022 period, the percentage of bales not picked up to BMAS stood, on average, at 31%. Thus, more than three bales out of every ten that were made available for shipment were, nonetheless, left waiting at the warehouse for lack of an available mode for transportation. The delay meant higher storage costs for the shipper, longer wait times for delivery to the buyer, and ultimately lost exports for U.S. exporters.

Not coincidentally, as the chart below shows, the number of empty outbound containers – especially from the west coast ports of Long Beach and Los Angeles, which typically carry containers to Asian destinations that are home to the largest U.S. cotton export markets – also rose during this same period.



Thus, the number of empty sailings increased during the same period that cotton sold forward suffered an increase in the number of late pick-ups at U.S. warehouses. Simply put, ocean common carriers rejected U.S. cotton exports for shipment despite robust export demand, in Asia and elsewhere. This rejection contributed to poor contract performance in the interior intermodal supply chain, to the detriment of U.S. cotton exporters and U.S. cotton producers, whose incomes are heavily dependent on access to foreign markets.

While estimates for the 2022 crop year are not yet complete, ACSA estimates that for the 2019²-2021 crop years, alone, U.S. cotton shippers faced more than \$318 million in added inland and ocean freight charges and another \$320 million in added storage costs, for a combined total of nearly \$639 million in added direct costs. It is important to note that this estimate only attempts to capture added direct costs for inland freight, ocean freight, and storage. It does not include the more than \$141 million in miscellaneous costs that were associated with supply chain disruptions during that period, nor does it attempt to capture the full extent of the economic damage suffered by U.S. merchandisers, who experienced additional market losses as commercial hedges, intended to be risk management tools, created market losses due to shippers' inability to deliver within contracted timeframes, exposing them to order cancellations.

VII. ACSA Supports the Use of a Document Export Strategy to Assess the Reasonableness of an Ocean Common Carriers Refusal to Deal

Since promotion of the growth and development of U.S. exports is a main purpose of OSRA, it is sensible to expect an ocean common carrier to offer backhaul services for U.S. goods that are destined for export and available for shipment. To this end, it is reasonable to expect an ocean common carrier to develop and maintain an export strategy that contemplates OSRA's purposes and guides the carrier in meeting its export-related obligations.

An agency's determination of what constitutes "reasonable" commercial behavior must necessarily consider the particularities of the norms and expectations of the industry stakeholders who are accustomed to working within the industry sector. Yet, regardless of the industry sector, what is considered "reasonable" must be grounded in the need to assure predictability for the industry participants who rely on the expected performance of industry counterparties.

² Excluding approximately one-third of the 2019 crop that was marketed and shipped prior to the COVID pandemic shutdowns.

An ocean common carrier may, of course, legitimately consider a number of commercial factors in its decision to accept or reject a particular containerized cargo for shipment. ACSA also agrees with the Commission's acknowledgement that a refusal to deal must be adjudged on a case-by-case basis.

With that in mind, it would be exceedingly difficult for the Commission to assess the reasonableness of a carrier's refusal to deal or negotiate in good faith with a specific U.S. shipper in a specific circumstance without a reliable basis for comparing that refusal against the carrier's own expectations for accommodating the needs of U.S. exporters, generally. A documented export strategy would reflect the predicted behavior of a carrier in the ordinary course of its business within the bounds set by OSRA.

For the same reasons, ACSA also supports the Commission's discretionary authority to consider other factors it may deem relevant for assessing the reasonableness of a carrier's refusal to deal, since the particularities of different cases will necessarily vary. The Commission cannot be expected to adjudge separate complaints on a case-by-case basis without also having the discretionary flexibility to understand the particularities of individual circumstances.

The more transparency and predictability into a carrier's intended behavior, compared to its actual behavior in particular circumstances, will be crucial in determining whether the carrier's refusal to deal with a specific U.S. exporter was reasonable or not.

VIII. ACSA Supports the Burden-Shifting Regime Concerning Proof of Reasonableness

Finally, ACSA agrees with the Commission's proposal to shift the burden of proof from the complainant to the carrier where a *prima facie* case of an unreasonable refusal to deal has been established. Allowing for this burden-shifting would facilitate an effective enforcement of OSRA.

ACSA believes that the spirit and letter of OSRA reflect a congressional intent to authorize the establishment of an enforcement mechanism that provides timely relief through an expeditious agency process of investigation and review, with full involvement of affected parties.

Given that enforcement of OSRA in such cases will necessarily require an assessment, on a case-by-case basis, of particularized circumstances, it would be unduly burdensome to expect the complainant to present all of the necessary, particularized facts that only the carrier may know. After a *prima facie* case of a violation of the statute's clear criteria has been established, the burden of explaining a carrier's performance must necessarily fall on the carrier.

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Thank you again for the opportunity to submit these comments on this very important topic. ACSA is grateful for the Commission's dedicated efforts to implement OSRA in a way that is consistent with both the letter and spirit of the law.

Respectfully submitted,

William H. Allen

President and CEO

American Cotton Shippers Association